Evaluation of the Test Case Funding Program

Final Report

February 9, 2009

Prepared for:

Indian and Northern Affairs Canada

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EXECUTIVE SUMMARY

The Test Case Funding Program (TCFP) is managed by Indian and Northern Affairs Canada (INAC). The TCFP was created to fund important Indian-related test cases that have the potential to create judicial precedents. Such precedents can clarify legal issues surrounding the interpretation of legislation, treaties, and/or constitutional instruments and can assist the Department to meet its objectives of fulfilling its legal, statutory, and constitutional responsibilities to Indians. In accordance with requirements set out in the most current decision to renew the Program, an evaluation has been completed to assess the Program's rationale/ relevance, design and delivery, success/impact, and cost-effectiveness/alternatives. Although material from the entire history of the TCFP was examined, the focus of this study is on the most current operations of the Program, particularly within the last five years (2003–2004 to 2007–2008). The full range of evaluation issues and questions is included in Table 1, Section 2.1.

Methodology

The methodology used to complete the evaluation includes the following components:

- A file and document review, where program documentation as well as 24 accepted case files and 16 rejected case files were reviewed
- 30 key informant interviews with representatives from INAC, Justice Canada, and other federal departments; expert lawyers; academics; and Aboriginal stakeholders
- A focus group with expert lawyers who have applied for test case funding and have appeared before the SCC on Aboriginal matters
- Five cases studies that illustrated how the Program functions

Profile of the Test Case Funding Program

The federal government began to fund test cases in 1965 that raised significant, unresolved Aboriginal legal issues; however, it was not until 1983 that INAC acted to formalize the Test Case Funding Program (TCFP). In 1988, the Treasury Board approved the creation of a separate Bill C-31 Test Case Funding Program to provide financial assistance to test cases resulting from 1985 amendments to the *Indian Act* which sought to remove sexual discrimination and allow Indian bands to assume control of their own membership. In 2005, the two programs were merged, and are now managed as a single program within INAC's Policy and Strategic Direction Sector.

The main purpose of the Program is to contribute to the legal and other associated costs of Indian-related cases that have the potential to create judicial precedents. Such precedents can clarify outstanding legal issues and can assist INAC to meet its objectives of fulfilling its legal, statutory, and constitutional responsibilities to Indian people. As precedents can also assist the policy development process within the Department, the TCFP has been conceived of as an essential component of the overall resolution strategy for the management of INAC's litigation inventory, a strategy that includes both litigating strategically and seeking settlements out of court.

It is possible to characterize the TCFP funding inventory into two diverse classes: core cases and strategic cases. Core cases follow the normal structure of the Program, which involves a review process to support or decline a funding recommendation following the receipt of an application by the Program Authority. Strategic cases, on occasion, are selected internally as part of the Department's overall litigation strategy and often do not involve an initial request for funding from an external party. In many instances, strategic cases involve the funding of a third party (or third parties) or intervener(s) in cases that hold particular importance for the Department. These cases are often funded at the trial level and have accounted for a significant proportion of the Program's total funding.

To date, the TCFP has funded 170 cases, and 50 of these have resulted in a disposition by the Supreme Court of Canada (SCC). Since 2003–2004, the TCFP has averaged expenditures of $1 million per year. In 2005, the Treasury Board renewed the authority of the program to March 31, 2010.

Evaluation findings

Rationale and relevance

The rationale for the TCFP appears to be founded upon two main considerations. First, the definitions of Aboriginal and treaty rights, which are guaranteed under s.35 of the *Constitution Act*, 1982, are marked by a great deal of ambiguity and are still evolving through the courts. Second, although there is a strong need to define federal responsibilities and Aboriginal rights, many Aboriginal groups do not have the financial resources to advance litigation. The Program provides greater access to the court system for these groups, which can facilitate the consideration of their perspectives during the clarification process.

Most recipients of funding stated that without the TCFP, many cases would not have been able to proceed, although even with test case funding, some Aboriginal groups still need to seek outside sources of funding (such as private fundraising) to fully finance their litigation. Other potential sources of government-provided funding for litigation include legal aid, the former Court Challenges Program, and court-ordered advanced costs orders (Jules orders); however, as with private funding, most informants stated that these options are limited and difficult to obtain.

The consultations found that some lawyers and Aboriginal informants either do not consider the Program or have stopped applying to the Program after being rejected on numerous occasions. There is a general perception that the level of program resources is limited and that trial-level cases are rarely funded. This perception was supported by interviews with Program management as well as correspondence found in case files, which often restrict funding to appeal-level cases on grounds that these cases possess a greater potential to create a precedent and that trial-level cases are often too costly to be supported by the Program. There was a general consensus among these informants that the inability of the Program to normally fund trial-level cases is a significant barrier for advancing potentially important test cases.

Some informants maintained that the 1985 amendments to the *Indian Act* (Bill C-31), although constituting an important area of Aboriginal law affecting many people seeking restoration of Indian status and band membership, are only one of the important areas of Aboriginal jurisprudence that require legal clarification. These informants questioned the rationale for the

particular focus on Bill C-31 by the TCFP and raised the possibility that other important areas of law could also be explicitly targeted. The evaluation concluded that the Program should not remove provisions for Bill C-31 funding from its Program criteria.

Design and delivery

Our analysis determined that the management and administrative procedures of the Program are applied consistently for core cases in which an applicant submits a standard application form to the Program Authority. Legal opinions are sought, and other INAC sectors and government departments impacted by the case are consulted during the briefing note process. Strategic cases, or those selected internally to support the Department's overall litigation strategy, are decided upon at higher levels, and thus are not subject to the normal review process governing test case funding. The evaluation was not able to discern whether a formal procedure exists for selecting strategic cases.

A large majority of informants, including funding recipients and government stakeholders involved in the review process, were very satisfied with the process of communication and the timeliness of interaction between them and the Program Authority. Additionally, both successful and unsuccessful applicants were satisfied with the reporting requirements outlined in the application form.

Although the evaluation found that the delivery structure of the TCFP is carried out consistently, discussions with several informants indicate that there is a perception of a lack of transparency, of the potential for conflicts of interest, and the potential for undue political influence on the Program. The evaluation did not find evidence to substantiate any allegations of impropriety; however, the evaluation recommended that the Program take steps to improve its transparency, eligibility criteria, and documentation procedures.

- ***Transparency***

The evaluation examined several advantages and disadvantages of the current practice of making information on the Program available on request only. Our findings suggest that the Program may not be well known among all potential users of the Program, and that even those who are aware of its existence are unaware of many aspects of its structure and delivery processes. Some informants in the government expressed that more active promotion of the Program may lead to an increased flow of applications, which could not be supported within the current budget. The evaluation noted that this does not have to be seen as a negative outcome, as increased competition for scarce Program resources may result in a more optimal selection of cases with precedential value. The evaluation concluded that while active promotion of the Program may not be necessary, eligibility criteria and information on how to apply for test case funding should be displayed in a public space.

- ***Perception of bureaucratic conflict of interest***

Although the concept of conflict of interest is normally only applied when a public servant's private interests may be in conflict with the public interest, many informants instead stated that the involvement of representatives from Justice Canada and other departments in the review stage may place their departmental/bureaucratic interests before public interest. The evaluation found that there are no straightforward solutions to mitigate this perception so long as the

Program continues to be delivered by the government as opposed to an external funding agency or independent body. The evaluation also found that since its inception, the TCFP has taken steps to minimize the involvement of Justice Canada in the review process. Still, government officials maintained that the TCFP is obliged to obtain legal opinions from Justice Canada. The evaluation concluded that allegations of bureaucratic conflict of interest on the part of representatives from Justice Canada are largely a hypothetical concern and do not reflect the reality of the Program.

- ***Authority to make funding decisions***

Several informants raised concerns over the control of the Program, namely the involvement of other sectors and departments of INAC and the authority of the Minister of INAC to make funding decisions. The evaluation found that the current delivery process is structured so that INAC retains complete control over funding decisions. This ultimate discretion is explicitly stated in the Program criteria and should come as no surprise to applicants. The decision to vest the Minister of INAC with the authority over funding decisions, however, adds the possibility of political influence on the Program. Our analysis of case files revealed very few instances of direct involvement from the Minister (aside from authorizing recommendations) in core cases. Some informants from within the government suggested that the current authority structure may improve Cabinet awareness of funding decisions and enhance governmental oversight; however the evaluation was unable to elucidate any other value-added benefits from involving the Minister in the funding decision process.

Success / impact

Many informants expressed that it is virtually impossible to evaluate the precise implication and significance of cases funded by the Program due to the subjective and fluid nature of law. Nevertheless, the vast majority of informants agreed that the Program is allowing for some important precedents to emerge and does provide legal clarity to outstanding issues, especially at the appeal level. Many informants stated that without TCFP, their cases would not have been able to proceed. Some informants mentioned important non-appeal cases that have been funded through the Program; however, the inability to ordinarily fund cases at the trial level was cited as a significant impediment to advancing the creation of important precedents in Aboriginal jurisprudence, as appeal cases are largely based on trial-level evidence.

In addition to the opinion of experts in Aboriginal law, the evaluation examined the proportion of Aboriginal-related cases at the Supreme Court of Canada level that were funded through the TCFP. Since 1983, the Program has funded approximately 52% of all Aboriginal-related cases at the Supreme Court of Canada level, while between 2003 and 2007, the TCFP has funded approximately 63% of Aboriginal-related cases at the Supreme Court of Canada. Our analysis excluded cases that do not focus particularly on an issue affecting Aboriginal rights or do not apply to a large number of Aboriginal peoples.

Other measures used to gauge the importance of cases funded through the TCFP are provided in an internal report commissioned by the Program Authority. This report examined the significance of Supreme Court of Canada cases funded by the TCFP and was conducted in 2008 by two independent contractors. The report found that 84% of Supreme Court of Canada cases

funded through the TCFP have been "applied" at least once in subsequent court judgements, while 75% have been mentioned more than 50 times (Malone and Fowler, 2008).

Though difficult to measure the direct impact, evidence suggests that the resolution of outstanding legal issues has led to economic benefits for Aboriginal groups, the government, as well as all Canadians. In particular, experts agreed that resolution and clarification of issues relating to the duty to consult / honour of the Crown, treaty rights, Aboriginal rights and title, as well as fiduciary duty have been particularly influential for economic development and have shaped public policy affecting the government's relationship with Aboriginal peoples.

Value for money / alternatives

The evaluation assessed whether the overall level of funding to the Program is appropriate to meet the Program's objective. On this point, it is clear that the Program could support more cases if it had more resources. In the past five years the Program has averaged an expenditure of $ 1 million with a perennial shortfall of funding considering the budget is $750,000. However, most agreed that the current level of resources has allowed the Program to fund a number of significant cases which have resulted in important Indian-related precedents.

Upon examining disbursements for the entire program, it was noted that a significant portion of the test case funding budget has been used to support strategic cases as part of the Department's litigation strategy. For example, although 24 cases were funded by the Program between 2003–2004 and 2007–2008, one strategic case accounts for approximately 46% of all expenditures.

Several informants raised concerns over some of the rates for eligible expenditures outlined in the contribution agreements. In particular, many lawyers claimed that the maximum hourly rate for senior legal counsel (set at $150/hour) is considerably below market rates and the rates paid to Crown lawyers. Some informants indicated that, in many instances, the funding provided by the Program does not fully cover the cost of litigation and suggested that rates be increased or made commensurate with rates paid to Crown lawyers. The evaluation noted that it is reasonable to expect that increasing the rates paid to counsel without increasing Program resources will likely result in fewer cases being funded; however there is a risk of the Program losing relevance in the future if it is unable to provide lawyers with the basic means to cover their operating costs. The evaluation did not uncover any concerns regarding the maximum contribution of $1.5 million for any one case through all levels of court.

- ***Jules decision***

The evaluation sought to determine whether the test for awarding court-ordered interim and/or advanced costs as set out in the 2003 Supreme Court of Canada decision in *British Columbia (Minister of Forests) v. Okanagan Indian Band et al* (henceforth referred to as the Jules decision) is undermining and/or could obviate the need for the TCFP. The findings, based on interviews and analysis, demonstrate that the Jules process on its own is not a substitute for the TCFP. The Jules process is still in its infancy, and thus far has not been applied on a sufficient scale to allow for a rigorous comparison with the TCFP regarding their relative impacts on the creation of Aboriginal precedents. Moreover, an opinion expressed by many informants is that, for better or worse, the courts have applied a very stringent test for awarding interim and advanced costs in that it may no longer be a viable alternative for funding in many circumstances.

Notwithstanding the difficulty of drawing conclusions on the future applicability of the Jules process, it is possible to compare the cost-effectiveness of the TCFP with the few examples of cases that have been funded under a Jules order. The findings in this regard indicate that when compared to court-ordered interim/advanced cost awards, the TCFP is a significantly more economical means of financing litigation for the government. Under the TCFP, the maximum rate for legal counsel is capped at $150/hour, which is significantly lower than market rates and the rates set by courts under the Jules process (testimony from informants confirmed that rates awarded under Jules orders have ranged from 1.5 to 2 times the rates capped by the TCFP). Moreover, the total available funding for any one recipient and case through all levels of court under the TCFP is set at $1.5 million, while informants confirmed that there have been no funding ceilings set under Jules procedures. Many informants noted that under the Jules process, the process of determining rates is often subject to costly and highly confrontational proceedings between the parties of the litigation.

- ***Alternatives***

To support a discussion of possible alternatives to the TCFP, our study identified five options available to the government: (1) termination of the TCFP; (2) continuation of the TCFP with operational improvements; (3) restriction of TCFP to strategic cases; (4) replacement of the TCFP with an arm's length public funding agency; and (5) replacement of the TCFP with an independent Aboriginal law agency.

The evaluation identified key advantages and disadvantages for each option, however recommendations are not provided as many of these scenarios are hypothetical and would need to be carefully analyzed in consultation with affected parties. The evaluation noted that the choice among these options is dependent upon the strategic direction INAC wishes to pursue in regard to the resolution of outstanding Aboriginal legal issues.

Recommendations

Recommendation 1: **The evidence presented in this evaluation supports continued funding of the Test Case Funding Program (no action required).**

Recommendation 2: **Evidence indicates that the eligibility conditions for funding relating to the 1985 amendment to the *Indian Act* (Bill C-31) should remain in the Program criteria (no action required).**

Recommendation 3: **a) Enhance program transparency by placing information on the Program on the Department's website and b) better document files.**

Recommendation 4: **As part of the program renewing process, INAC should review and update the current program's terms and conditions to establish clearer funding parameters.**

Recommendation 5: **Given the current Program budget of $750,000/annum, funding should be restricted to test cases at the appeal level.**

Recommendation 6: **Any future renewal of the TCFP should consider indexing the hourly rates paid to legal counsel to inflation.**

Management Response and Action Plan

Recommendations	Actions	Responsible Manager	Planned Implementation Date
1. The evidence presented in this evaluation supports continued funding of the Test Case Funding Program.	No action required		
2. Evidence indicates that the eligibility conditions for funding relating to the 1985 amendments to the Indian Act (Bill C-31) should remain in the Program criteria.	The eligibility conditions will be reviewed and recommendations formulated on whether they should be retained, modified or eliminated in light of the Supreme Court of Canada decision in Jules v. The Queen (2002).	Manager, Test Case Funding	January, 2010
3. Enhance program transparency by: a) placing information on the Program on the Department's website; and	a) The desirability of placing program information on the Departmental website will be analysed and recommendations formulated.	a) Manager, Test Case Funding	a) March 31, 2010
b) better documenting files.	b) The feasibility of preparing ongoing/final case summaries for program files will be analysed and	b) Manager, Test Case Funding	b) March 31, 2010

Recommendations	Actions	Responsible Manager	Planned Implementation Date
	recommendations formulated.		
4. As part of the program renewing process, INAC should review and update the current program's terms and conditions to establish clearer funding parameters.	In connection with recommendation 2, and the possible preparation of program renewal documents on the renewal or not of the Test Case Funding Program (currently to terminate March 31, 2010), the program will review all program terms and conditions for legal/policy feasibility, relevance and clarity, and make recommendations .	Manager, Test Case Funding	January, 2010
5. Given the current program budget of $750,000/annum, funding should be restricted to test cases at the appeal level.	As with actions pursuant to recommendation 4, the program will analyse and formulate recommendations on the desirability/feasibility of restricting funding to appeal level cases.	Manager, Test Case Funding	January, 2010
6. Any future renewal of the TCFP should consider indexing	As with actions pursuant to	Manager, Test Case Funding	March 31, 2010

Recommendations	Actions	Responsible Manager	Planned Implementation Date
the hourly rates paid to legal counsel to inflation.	recommendations 4 and 5, the program will analyse and make recommendations on the desirability/feasibility of indexing the hourly rates paid to legal counsel to inflation.		

I concur: _____

Date: _____

Daniel Watson, Senior Assistant Deputy Minister

1.0 Introduction

The Test Case Funding Program (TCFP) is managed by Indian and Northern Affairs Canada (INAC). The TCFP was created in 1983 to fund important Indian-related test cases which have the potential to create judicial precedents. Such precedents can clarify legal issues surrounding the interpretation of legislation, treaties, and/or constitutional instruments and can assist the Department to meet is objectives of fulfilling its legal, statutory and constitutional responsibilities to Indians.

INAC committed to evaluate the TCFP to assess its effectiveness and impact, its delivery structure and rationale. In June 2008, the Department contacted PRA Inc. to assist in conducting the evaluation. This document constitutes the evaluation final report. It includes five key sections, in addition to appendices:

- Section 2.0 presents the methodology used to evaluate the TCFP.
- Section 3.0 describes the Program, including its administrative structure and the resources invested in it.
- Section 4.0 describes the main findings that emerged from the evaluation. Its structure reflects the evaluation issues and questions identified in the evaluation framework.
- Section 5.0 presents conclusions and recommendations based on the evaluation findings.
- The appendices include the bibliography and the set of data collection instruments used as part of this evaluation.

2.0 Methodology

2.1 Evaluation issues and questions

As established by the evaluation framework, the objective of this evaluation is "to assess the Test Case Funding Program's relevance/rationale, design/delivery, success/impacts and cost effectiveness/alternatives." More specifically, the evaluation is expected to address the issues and questions outlined in Table 1.

Table 1: Evaluation issues and questions
Issue: Relevance/Rationale
1. How does the TCFP reflect current priorities of the Government of Canada and Indian and Northern Affairs Canada?
2. What is the rationale for maintaining the TCFP?
3. What would be the consequence of not having the TCFP?
4. Would there be accessibility to the court system for Aboriginal plaintiffs if the TCFP were not available?
Issue: Design/Delivery
5. Do the activities of the TCFP reflect principles of effective program delivery? Does the Program have effective and clear procedures for applying for funds, criteria for determining eligibility and other management procedures? Are the criteria consistently and transparently applied to applications? Are fully justified funding recommendations concerning cases that meet program criteria being made?
6. Does the TCFP have effective management to oversee how the funds it awards are managed?
7. Do the activities and outputs all contribute to meeting the Program's objective? What activities and outputs, if any, could be dropped without harming the Program?
8. Do clients understand the eligibility requirements? Are they satisfied with the service and support offered by the TCFP?
Issue: Success/Impacts
9. Are the intended impacts of the Program being achieved? Specifically, is the Program funding cases that have the potential to become judicial precedents? If so, are these cases resolving/clarifying specific legal issues to the benefit of Aboriginal Canadians and non-Aboriginal Canadians?
10. Is the development of a body of Aboriginal-related judicial precedents being accelerated by the existence of the TCFP?
11. Is the resolution of key cases funded by the TCFP ever a catalyst for significant economic development initiatives/activities?
Issue: Cost-effectiveness/Alternatives
12. Is the TCFP a cost-effective way to meet the stated objective of creating Aboriginal-related judicial precedents? Is it a better cost option for the government than costs incurred under a Jules order to support unresolved Aboriginal claims deemed to be in the public interest?
13. Is the current maximum amount of funding for each individual case adequate to support test cases? Is the maximum hourly rate paid to legal counsel adequate?
14. Are there more effective ways of delivering test case funding? Would other delivery structures minimize cost and/or the potential for conflict of interest?

As the TCFP is set to expire on March 31, 2010, the evaluation findings are also expected to assist the Department in determining the appropriate strategy in relation to possible renewal.

2.2 Research methods

Table 2 describes the research methods used to address these evaluation issues and questions.

Table 2: Methodology

Method	Data sources
File and document review	Relevant documents and files were identified and reviewed to support the evaluation: Case files:[1] – Since 1983, the Program has funded approximately 170 test cases (several funding decisions are pending). Between 2003-2004 and 2007-2008 the Program funded 24 cases. The review of case files included all 24 cases (100%) from these years. – Closed and active files were considered for review. As 10 cases in the review period were opened prior to 2003-2004, our review often examined files opened before 2003. – Between 2003-2004 and 2007-2008, the Program rejected 31 applications for funding. The review of rejected files included 16 cases (52%) from these years. Program documentation (program criteria, application form, internal administrative and financial files, memoranda, and reports) Treasury Board Decision to Renew the TCFP (January 31, 2005) Past evaluations (Milligan & Company Inc., 1989; Oscapella & Associates, 1988) Study of the Legal Significance of Supreme Court Cases Funded by the Indian and Northern Affairs Canada TCFP (1983–2007) — A report prepared for Indian and Northern Affairs Canada (INAC) by Nicholas Malone and Rod Fowler, May 2008
Key informant interviews	A total of 30 interviews were conducted with a variety of key informants: – Key personnel at Indian and Northern Affairs Canada affiliated with the TCFP including Program Managers as well as Managers in the Policy and Strategic Director Sector (n=5) – Key personnel from Justice Canada/INAC Legal Services Unit who have been involved with providing legal opinions to the TCFP (n=6) – Key personnel in federal departments outside of INAC and Justice Canada who have been part of the TCFP application review process (n=3) – Expert lawyers in Aboriginal law who have applied for and/or received TCF (n=6) – Key academics with expertise in Aboriginal law (n=5) – Aboriginal stakeholders who have applied for and/or received TCF (n=5)
Focus group	A focus group was conducted with five expert lawyers who have appeared before the Supreme Court of Canada on Aboriginal matters. The purpose of the focus group was to probe deeper into key issues affecting the TCFP and to clarify responses we received during the interview stage of our evaluation. The four topics discussed were: court-ordered interim and advanced costs (Jules decision); transparency of the Program; trends in Aboriginal jurisprudence; and TCFP criteria.
Case studies	To better illustrate how the Program functions, the evaluation includes five case study reports (covering seven cases) ongoing between 2003–2004 and 2007–2008. Cases were explored through a combination of file reviews and interviews and were selected to illustrate several areas of Aboriginal jurisprudence supported by the Program: – Fiduciary duty and vicarious liability (Indian Residential Schools) – Constitutional issues (status of Métis persons) – Treaty rights – Aboriginal Rights and Title – Duty to consult / Honour of the Crown – 1985 amendments to the Indian Act (Bill C-31)

[1] Evaluators were restricted from viewing legal opinions from Justice Canada/INAC Legal Services Unit.

2.3 Evaluation management process

The evaluation was directed and managed by the Evaluation, Performance Measurement and Review Branch of INAC. The Branch's role was to provide input into the project's terms of reference and to facilitate the evaluator's access to documents and key informants.

2.4 Impact of confidentiality requirements

Justice originated documents such as memoranda on SCC decisions are solicitor-client protected. Evaluators were restricted from viewing legal opinions from Justice Canada/INAC Legal Services Unit. The evaluation was unable to verify the quality and consistency of opinions provided on whether an applicant's case has the potential to create a judicial precedent. However, legal decisions were noted throughout the file and document review of the evaluation and their impacts on key issue areas in Aboriginal law carefully considered.

Evaluators did not provide informants with specific case information during key informant interviews and the focus group session. In order to protect the confidentiality and maintain neutrality, the list of cases funded by the TCF Program were not provided to informants. This made it difficult for informants and experts to discuss the relative significance and impacts of cases beyond their own experience with the Program. However, evaluators focused the discussion toward important developments/decisions in key areas of Aboriginal jurisprudence, which provided informants with an opportunity to list significant cases and precedents. Evaluators did find considerable evidence that decisions funded by the TCF Program are supporting the development of Aboriginal case law through precedents.

To ensure the confidentiality of TCF Program applicants, recipients, and informants who participated in this evaluation, information presented in this report does not identify the names of cases supported by the Program or names of individuals.

3.0 Profile of the Test Case Funding Program

First established in 1983, the TCFP has seen its mandate, activities, and management structure evolve over the years. The purpose of this section is to describe the current program and provide a brief historical overview.

3.1 Program objectives and activities

3.1.1 Historical context

In the wider context of Canadian history and culture, it became evident during the mid-twentieth century that Canadian society and the Canadian legal system would benefit from a more contemporary set of Indian case laws. In this light, INAC began to fund test cases in 1965 that raised significant, unresolved Indian legal issues. Since its conception, the core objective of this test case funding has not changed significantly; however, its day-to-day operations have undergone a vast evolution.

In 1965, the original concept of the Program was established by INAC and the Department of Justice (Justice Canada). At the outset, the Program was planned strictly for cases involving treaty rights, *Indian Act* issues, and the criminal charge of murder. The two departments worked together to evaluate applications for funding, asking whether the case in question raised an important legal issue with consequences for a large number of Aboriginal people. If they agreed, INAC would provide funding to the lawyer of the Aboriginal person(s) concerned.

For 17 years, the Program operated in this manner and funded approximately 25 test cases dealing with issues such as the definition of hunting rights under treaties and the (Prairies) Natural Resources Transfer Agreements; labour law jurisdiction on reserves; the effect of adoption on entitlement to registration; taxation on reserves; and the paramountcy of *Indian Act* fishing by-laws versus *Fisheries Act* regulations. During this period, there was no specific set of parameters on funding as a whole or for individual cases. Between 1972 and 1982, the Program spent approximately $250,000 on tests cases. Information is not available on expenditures between 1965 and 1972.

At the time of the enactment of the *Constitution Act 1982* which recognized and affirmed Aboriginal and treaty rights, the legal environment defining the relationship between the federal government and Indians changed substantially. The Guerin case, although not yet decided by the Supreme Court of Canada, raised the possibility that the federal Crown might be held liable for breach of fiduciary obligations in its dealings with (or on behalf of) Indians. The Department recognized that this development, in addition to an increasing trend of native litigation seeking recognition of claimed rights and the redress of grievances, would likely result in a greater demand for financial assistance from Indian litigants. In 1983, INAC sought Treasury Board approval to formally authorize the TCFP. The Treasury Board approved the terms and conditions of the Program and allowed funding of $175,000 per year and a maximum contribution of $100,000 per recipient to cover all levels of litigation.

In 1985, Parliament passed amendments to the *Indian Act* which sought to remove sexual discrimination, to restore rights lost in the past as a result of this discrimination, and to allow Indian bands to assume control of their own membership. The federal government also approved a multi-year fund of $3 million to provide financial assistance to test cases resulting from these amendments. In September of 1988, the Treasury Board approved Bill C-31 Test Case Funding Contribution Program to formalize this purpose. The federal government on several occasions renewed this program, which operated in tandem with the original TCFP.

In 2005, the federal government merged Bill C-31 Test Case Funding Contribution Program with the original TCFP and now both are managed as a single program within INAC's Policy and Strategic Direction Sector.

3.1.2 Stated objective of the Program

The objective of the Program is substantially the same as when it was created: to contribute to the legal and other associated costs of Indian-related cases which have the potential to create judicial precedents. Such precedents can clarify outstanding legal issues and can assist INAC to meet its objectives of fulfilling its legal, statutory and constitutional responsibilities to Indian people. As precedents can also assist the policy development process within the Department, the TCFP has been conceived as an essential component of the overall resolution strategy for INAC's management of litigation inventory, litigating strategically and seeking settlements out of court.

Clause 2 of the Program criteria defines who may benefit:

- "any litigant before a Canadian court in important, unresolved Indian-related litigation of general application to a large number of Indians"
- "the potential recipient must not be eligible for legal aid (the financial resources available or prospectively available to a potential recipient will be considered)"
- "interveners will generally be eligible for funding only in exceptional circumstances (e.g., where the intervention constitutes the only means to bring the Indian interest before the court)"
- "in litigation involving Bill C-31, interveners are eligible for funding only where they are arguing in support of the thrust of the Crown's position"
- "in Bill C-31 litigation, parties bringing actions solely against the Crown are not eligible for funding for those actions. This is not intended to exclude from funding those appeals from decisions by the Registrar on protests relating to band membership."

Program criteria further stipulate that funding will be made available "on a discretionary basis and will depend on the availability of resources; the issue(s) involved in the litigation must be irresolvable through any other means; and, must be in the interest of both the Indian people and the Federal government to have the matter resolved in the courts." Moreover, it is set out that the Department reserves the right to deny funding for any litigation at any particular stage, even

where the criteria and other eligibility factors have been met and that preference will be given to cases at the appeal level.

3.1.3 Expected impacts

The TCFP is intended to develop a body of Aboriginal case law through the establishment of legal precedents in order to clarify long-standing unresolved legal issues, and to support the policy development process within INAC.

The Program is expected to contribute to the achievement of a series of immediate, intermediate, and long-term outcomes:

- In the short term, the TCFP is expected to resolve and clarify the specific legal issue(s) particular to the funded case.
- In the medium term, the TCFP is expected to lead to the development of a body of Aboriginal case law through the establishment of legal precedents. Additionally, it is intended to assist INAC in upholding its responsibilities to Aboriginal peoples.
- In the long term, the TCFP is expected to contribute to the resolution of legal, policy, and social issues outstanding between Aboriginal peoples and other sectors of Canadian society.

Finally, the TCFP is expected to support the Department's strategic mission of working together to make Canada a better place for Aboriginal and Northern people and communities.

The Program's logic model is presented on the following page.

Logic Model for the Test Case Funding Program

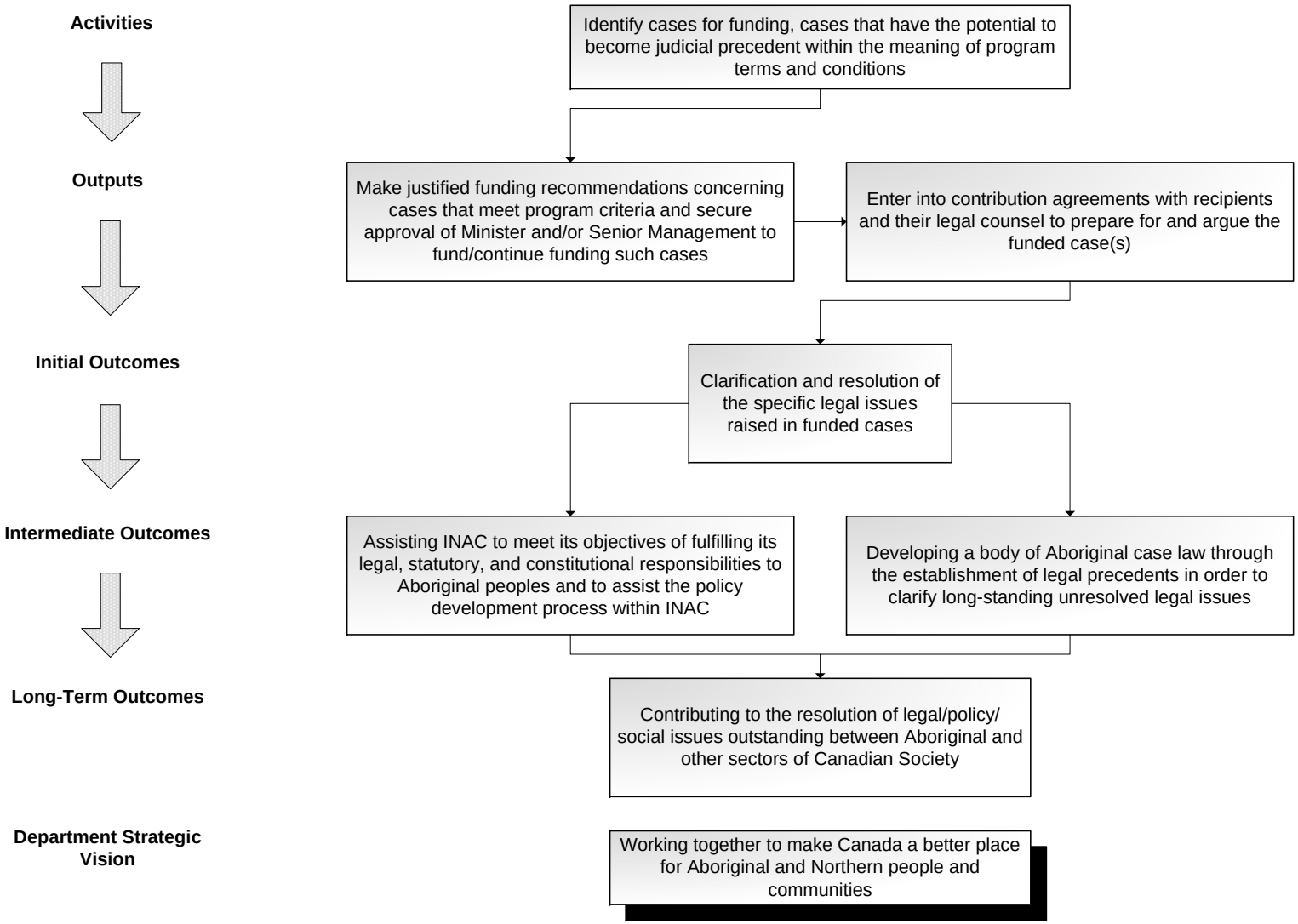


Figure 1

3.1.4 Special litigation funding arrangements

In reviewing the activities and expenditure patterns of the TCFP, it is possible to characterize Program funding into two diverse classes: core cases and strategic cases.

Core cases follow the normal structure of the Program which involves a review process to support or decline a funding recommendation following the receipt of an application by the Program Authority. Strategic cases, on occasion, are selected internally as part of the Department's overall litigation strategy and often do not involve an initial request or application for funding from an external party. In many instances, strategic cases involve the funding of a third-party (or third parties) or intervener(s) in cases that hold particular importance for the Department. These cases are often funded at the trial level and have accounted for a significant proportion of the Program's total funding.

Strategic cases at times arise from a court request to provide funding for a particular case and are often approved by Cabinet. For example, in 1986, the government was asked to provide substantial assistance for litigation of three Aboriginal rights cases in British Columbia. The amounts requested for each case exceeded both the maximum funding limit per recipient established by the Treasury Board and the total Program budget. To support these requests, the Department sought and obtained Cabinet approval for supplementary funding.

Although the procedures governing funding requests are processed differently for strategic cases and core cases, in both scenarios the TCFP Authority is entrusted with the primary responsibility of managing and reviewing funding requests, preparing and administering contribution agreements, as well as maintaining correspondence and interaction with the funding recipient(s).

3.2 Delivery structure

Since the 2005 consolidation of the original TCFP with the Bill C-31 Test Case Funding Contribution Program, the delivery structure of Program funding has typically observed the following elements and parameters for its standard core cases. Figure 2 (page 11) identifies key components of the TCFP's delivery structure.

Initial Screening

An applicant makes contact with the Program through an INAC regional office or directly with the TCFP at INAC Headquarters. The Program then provides the prospective applicant with program criteria and a standard application form, which asks for case details (including legal issues), an estimate of financial requirements and a schedule for the litigation process. An INAC contractor then examines the application, requesting further information where required. This preliminary analysis looks at the quality of the match between the applicant's case and the criteria of the Program.

Where an application is judged prima facie to meet program criteria, the TCFP Manager requests a legal opinion from the National Litigation Coordination Unit, Legal Services Branch, Justice Canada on whether the prospective case has the potential to establish judicial precedent.

If Justice Canada concludes that the applicant's case does not have the potential to create Aboriginal-related judicial precedent, the application is rejected. If Justice concludes that the application does have the potential to create judicial precedent, then the TCFP Manager begins preparing a draft briefing note that includes pertinent information regarding the prospective funding request and a synopsis of Justice Canada's legal opinion. Financial considerations are also reviewed at this stage, but do not solely qualify or disqualify an application.

Recommendation and Approval

The TCFP Manager forwards the draft briefing note to Directors General of various regions, sectors, and branches within INAC that will be impacted by the particular test case and, thus, whose insight into the validity and wider implications of the case is considered highly valuable. The note is also sent to directors general of other federal departments and agencies where applicable. Each party reviews the briefing note and makes recommendations on whether or not to fund the applicant case based on its potential implications for their respective areas. If a consensus is reached between the review parties, the TCFP Manager finalizes the briefing note, and forwards it to the Deputy Minister for review. If the Deputy Minister agrees with the recommendations, s/he relays the note to the Minister of INAC who has decision-making authority with regard to applications for test case funding.

Preparation of a Contribution Agreement

When an application is approved for funding by the Minister, the TCFP prepares a contribution agreement. This document outlines the basic requirements and responsibilities of all parties. The contribution agreement is always a three-party contract between INAC, the nominal recipient, and the nominal recipient's legal counsel. The contribution agreement reflects the terms of approval given by the Minister and the terms and conditions of the Program as approved by the Treasury Board.

Supervision of the Contribution Agreement

This stage of program delivery involves a wide range of management and maintenance activities. Program staff maintain files on the case as it develops, which typically include correspondence, background documents, judgements, funding details (i.e., billings, reimbursement receipts), and the contribution agreement.

The supervision process includes ongoing review of these files to ensure that the activities undertaken and the services and expenses claimed conform to the contribution agreement. Contributions are paid on a reimbursement basis and are made directly to the nominal recipient's legal counsel. Contribution agreements are managed and renewed (where necessary) on a fiscal year basis.

Key components of the program's delivery structure

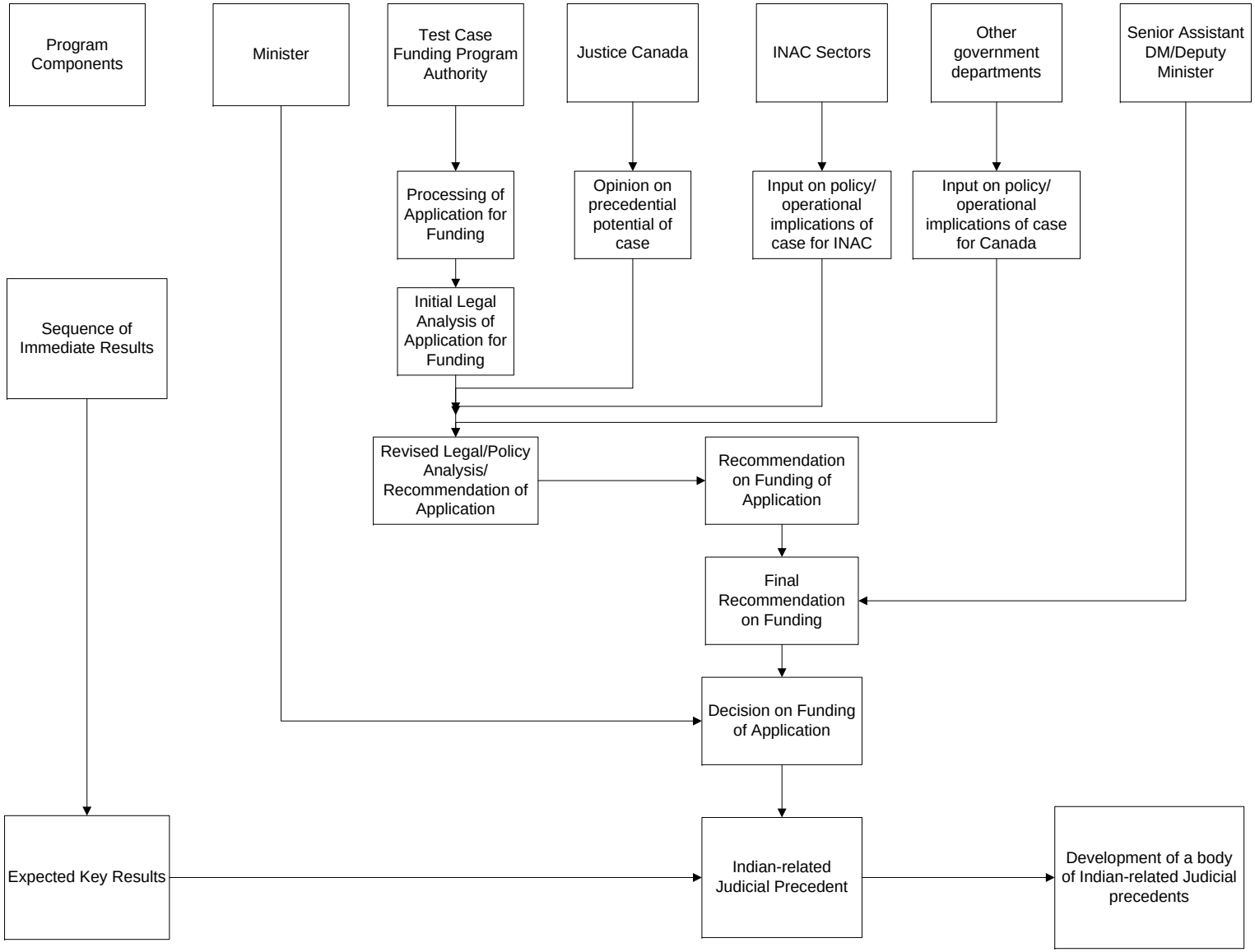
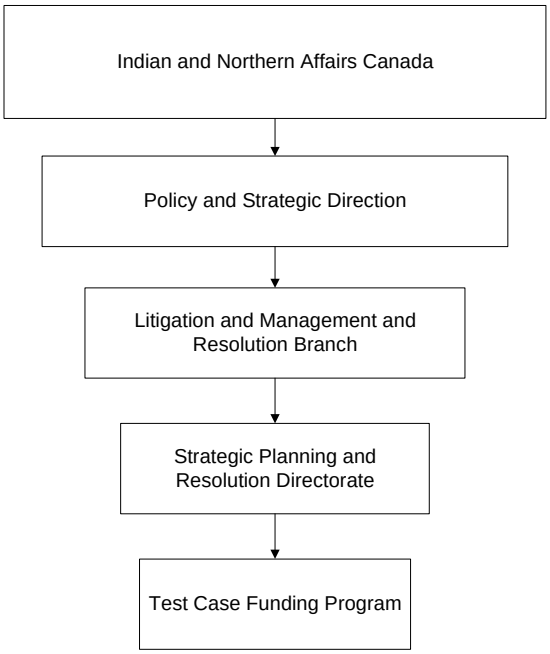


Figure 2

3.3 Resources

The TCFP is managed at INAC Headquarters within the Policy and Strategic Direction Sector under the Litigation Management and Resolution Branch and the Strategic Planning and Resolution Directorate. It is currently staffed with one PM-06 Manager and a PM-02 Operations Officer.



Since 1983, the TCFP has had an average annual expenditure of approximately $750,000, even though the official program reference level was $500,000. Increases in expenditure have been supported through internal offsets. Between 2000 and 2005, $250,000 of this funding was provided by the Program Integrity Initiative. With the termination of this initiative at the end of 2003-2004, the TCFP reverted to its original A-base value of $500,000.

The January 2005 renewal of the Program authorized a transfer of $250,000 from Vote 1 Operating Expenditures to Vote 10 Grants and Contributions to increase the annual budget from $500,000 to $750,000. This decision also increased the funding ceiling from $1 million to $1.5 million for any one recipient for any one case through all levels of the judicial system. In June of the same year, the Treasury Board approved approximately $15 million to implement *Powley – A Strategic Approach* (PSA). This was in response to the 2003 Supreme Court of Canada decision in R. *v*. Powley, which held that the Métis community of Sault Ste. Marie, Ontario has a constitutionally protected right to harvest for food. This approach included an additional $250,000 to the TCFP for 2005-2006 and 2006-2007 to support Métis and Non-Status Indian test cases.

Since 2003-2004, the TCFP has averaged expenditures of $1 million per year which amounts to a perennial shortfall. The following table presents the total funding provided by the Program in the last five years.

Table 3: TCFP funding history

Year	Number of cases funded	Total funding	TCFP budget	Surplus/(Shortfall)
2003-2004	14	$790,505.32	$500,000	$(290,505.32)
2004-2005	8	$754,870.90	$500,000	$(254,870.90)
2005-2006	11	$1,100,493.09	$1,000,000 (base + PSA)	$(100,493.09)
2006-2007	7	$1,579,954.31	$1,000,000 (base +PSA)	$(579,954.31)
2007-2008	4	$883,154.36	$750,000	$(133,154.36)
TOTAL	**N/A**	**$5,108,977.98**	**$2,750,000**	**$(1,358,977.98)**

4.0 Evaluation findings

This section presents the findings of the evaluation research, which are based on the file and document review, key informant interviews, the focus group with expert lawyers and case studies. The evaluation issues and questions identified in the evaluation framework (see Table 1) form the structure for the information presented in the following sections.

4.1 Relevance and rationale

How the Program reflects on current government priorities

INAC is one of the federal departments responsible for meeting the Government of Canada's obligations and commitments to First Nations, Inuit and Métis, and for fulfilling the federal government's constitutional responsibilities in the North. The Department's responsibilities are largely determined by numerous statutes, negotiated agreements and relevant legal decisions.

INAC has outlined a strategic vision to work together to make Canada a better place for Aboriginal and Northern people and communities. This vision is supported by its mandate to support Aboriginal peoples (First Nations, Inuit and Métis) and Northerners in Canada's pursuit of healthy and sustainable communities and broader economic and social development objectives. It is expected that these objectives will allow Aboriginal peoples and Northerners to:

- improve social well-being and economic prosperity;
- develop healthier, more sustainable communities; and,
- participate more fully in Canada's political, social and economic development – to the benefit of all Canadians.[2]

Within these broad objectives, INAC has a responsibility to resolve outstanding disputes between Aboriginal peoples and the government through the negotiations of claims (i.e., specific, special, and comprehensive) and self-government, treaty commissions, treaty tables, Inuit relations, and consultation and accommodation.[3]

The Policy and Strategic Direction Sector of INAC is involved in several activities that support the Department's efforts to resolve outstanding disputes. The TCFP figures among these activities. In the intermediate term, the Program is expected to "assist INAC to meet its objectives of fulfilling its legal, statutory, and constitutional responsibilities to Aboriginal peoples; assist the policy development process within INAC; and, to develop a body of Aboriginal case law through the establishment of legal precedents in order to clarify long-standing unresolved legal issues." It is expected that these outcomes will lead to long-term reconciliation, clarification of responsibilities, and resolution of issues and disputes outstanding between the federal government, Aboriginal peoples, and other sectors of Canadian society.

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2 For more information on the Department's mission and strategic objectives, consult the following website: http://www.ainc-inac.gc.ca/ai/index-eng.asp

3 See Program Activity Architecture 2009-2010, http://www.ainc-inac.gc.ca/ai/arp/mrr2-eng.asp

Findings

The consultations with INAC representatives confirm that this perspective is broadly shared. All key informants consulted within INAC believe the Program clearly fits the mandate of the Department, as it promotes the resolution of outstanding disputes, which was considered a necessary component of promoting healthy communities and allowing for economic and social development. Informants outside of government were mostly reluctant to speak to the government's priorities.

Funding interest group litigation

The appropriateness of providing government support for groups and individuals to initiate litigation against their own government has been subject to debate. Often referring to the notion of "interest group litigation," several academics have explored the impact of groups and individuals bringing sensitive, and often controversial, issues to the attention of the courts, rather than leaving them to the Parliament or provincial legislatures to address. Literature identifies the following benefits of interest group litigation in the context of Aboriginal jurisprudence:[4]

- A power imbalance in the political arena may leave minority interests vulnerable to exclusion. The courts can moderate this by ensuring that minority interests are heard.
- Aboriginal rights (and Charter) litigation is expensive. Without programs such as the TCFP, only groups and individuals who have financial and political advantages might raise challenges in court.
- Interest group litigation helps ensure that the courts hear a wider range of perspectives on an issue before arriving at a decision. Litigation therefore has the potential to make public institutions more accessible, transparent, and responsive.
- Elected institutions do not necessarily reflect the diversity of Canadian society. Without courts enforcing constitutional guarantees, government could make choices that harm minorities.
- Without groups ready to litigate, the provisions in s.35 of the *Constitution Act 1982*, might have little impact. The *Constitution Act* is a document, and documents are not self-enforcing. Interest group litigation serves as an important check and balance on government action.

At the same time, others argue that supporting interest group litigation does not achieve greater access and transparency within public institutions and that it may not be the best way to deal with complex social policy issues.[5] The literature identifies several concerns with respect to interest group litigation:

- Some believe that funding group litigation is undemocratic in that it puts particular interest groups in control of the courts' agenda, which in effect, excludes other groups and members of the public.

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4 This information is compiled from Hein (2000), Brodie (2001), Peltz (1997) and Eid, et al. (2001).

5 Eid, et al. (2001).

- Government support for interest group litigation intensifies rights-based rhetoric, which could diminish full discussion and presentation of opposing views in Parliament. This view implies that Parliament is the preferred venue for debate of social policy issues.

- Many legal claims raise difficult moral, economic, and political questions. These controversial claims may pit courts against elected bodies by asking judges to qualify, or even reject, decisions of elected officials.

- When government initiates a program that facilitates access to the courts, such as the TCFP, it must determine which groups may access this funding, the level of funding, and for what types of cases. Achieving fairness in this context may prove challenging.

Findings

Many of these ideas identified in the literature were mentioned by informants when discussing the wider context in which the TCFP operates.

The Rationale for the Test Case Funding Program

The rationale for the TCFP appears to be founded on two main considerations:

- *Clarification of rights*: By the 1970s, Canadian courts had begun to acknowledge that Aboriginal peoples' occupation of the land prior to European contact gave rise to legal rights not provided for by treaty or statute. These rights are shaped by the broader practices, traditions and customs that distinguish the unique culture of First Nations groups prior to European contact. Aboriginal and treaty rights, which are guaranteed under s.35 of the *Constitution Act 1982*, are still marked by a great deal of ambiguity. Section 35 did not create rights but instead recognizes and affirms the "existing Aboriginal and treaty rights" of the Aboriginal peoples of Canada. The specific definition and task of interpreting these rights has been the subject of ongoing and complex processes of negotiation and resolution through litigation in the courts. Issues relating to Aboriginal title, including the extent of governments' duty to consult Aboriginal peoples, the scope of governmental authority to regulate the exercise of treaty rights, the inherent right of self-government, and other matters of fundamental concern to Aboriginal peoples, are matters which still appear regularly before Canadian courts.

- *Access to the justice system*: Although there is a strong need to define federal responsibilities and Aboriginal rights, many Aboriginal groups do not have the financial resources to advance litigation. Several informants mentioned that the difficulty of accessing justice for many Aboriginal groups is exacerbated in many instances as cases often do not lend themselves to the standard methods of remuneration for the Aboriginal group's legal counsel (i.e., contingency agreements) as often the remedy being sought is something that cannot be used to pay legal fees (e.g., land that is protected from seizure or sale and/or an Aboriginal right that holds no inherent economic value). All informants expressed that the Program does allow for greater access to the court system for these groups which can facilitate the emergence of their perspectives to be considered during the clarification process.

Findings

There was unanimous support among key informants that the process of clarifying Aboriginal and treaty rights is still evolving. There was also widespread agreement that litigation is an important avenue to resolve these outstanding issues. Nearly all informants expressed that there is a strong need for government funding to ensure disadvantaged groups are given access to justice.

Most recipients of funding stated that without the TCFP, many cases would not have been able to proceed. Although even with test case funding, in some situations, Aboriginal groups still need to seek outside sources of funding, such as private fundraising, to fully finance their litigation. Other potential sources of government-provided funding for litigation include legal aid, the former Court Challenges Program, and court-ordered advanced costs orders (Jules orders); however, as with private funding, most informants stated that these options are limited and thus difficult to obtain.

Some informants maintained that the 1985 amendments to the *Indian Act* (Bill C-31), although constituting an important area of Aboriginal law affecting many people seeking restoration of Indian status and band membership, are only one of the important areas of Aboriginal jurisprudence that require legal clarification. These informants questioned the rationale for the particular focus on Bill C-31 by the TCFP and raised the possibility that other important areas of law could also be explicitly targeted.

The consultations found that some lawyers and Aboriginal informants either do not consider the Program or have stopped applying to the Program after being rejected on numerous occasions. There is a general perception that the level of program resources is limited and that trial-level cases are rarely funded. This perception was supported by interviews with Program management as well as correspondence found in case files which often restrict funding to appeal-level cases on grounds that these cases possess a greater potential to create a precedent and trial-level cases are often too costly to be supported by the Program. There was a general consensus among these informants that the inability of the Program to normally fund trial-level cases is a significant barrier for advancing potentially important test cases.

4.2 Design/delivery

Conformance to program delivery structure

Findings

The Program Authority has established a number of administrative processes to facilitate access to TCFP and to support an efficient review process (see Section 3.2). Our analysis determined that these procedures are applied consistently for core cases in which an applicant submits a standard application form to the Program Authority. Although we were restricted from viewing legal opinions provided by Justice Canada, the analysis of TCFP files found that that the Program Authority follows this procedure and seeks consultation with other sectors of INAC and the federal government to form a funding recommendation to the Minister of INAC. Strategic cases, or those selected internally to support the Department's overall litigation strategy, are decided upon at higher levels, and thus not subject to the normal review process governing test case funding. This evaluation was not able to discern whether a formal procedure exists for

selecting strategic cases. For the purposes of analysis, cases were classified as strategic if it was apparent from the file review that their selection did not follow the standard application and review process. Table 4 presents a breakdown of cases funded between 2003-2004 and 2007-2008.

Table 4: Cases funded between 2003-2004 and 2007-2008

Level of Court	#	% (of all cases)	$	% (of all cases)	Issue areas
Core cases					
Supreme Court of Canada	10	42	$1,379,445.30	27	Aboriginal Rights and Title
					Exemption from Taxation and Seizure
					Fiduciary Duty and Vicarious Liability
					Treaty Rights
					Cost of Litigation
					Honour of the Crown / Duty to Consult
					Application of Provincial Laws to Indians and Lands Reserved for Indians
Provincial Court of Appeal	2	8	$59,660.59	1	Treaty Rights
					Application of Provincial Laws to Indians and Lands Reserved for Indians
Federal Court – Trial Level	5	21	$998,740.66	20	1985 amendments to the *Indian Act* (Bill C-31)
					Métis and Non-Status Indians (*Constitution Act 1982* and *Indian Act*)
					Application of Provincial Laws to Indians and Lands Reserved for Indians
CORE TOTAL	**17**	**71**	**$2,437,846.55**	**48**	
Strategic cases					
Provincial Court of Appeal	1	4	$149,725.17	3	Treaty Rights
Provincial Superior Court	3	13	$30,613.87	1	Treaty Rights
					Aboriginal Rights and Title
Federal Court – Trial Level	3	13	$2,490,792.39	49	Treaty Rights
					1985 amendments to the *Indian Act* (Bill C-31)
					Métis and Non-Status Indians (*Constitution Act 1982* and *Indian Act*)
STRATEGIC TOTAL	**7**	**29**	**$2,671,131.43**	**52**	

Note: Totals may not sum to 100% due to rounding.

A large majority of informants, including funding recipients and government stakeholders involved in the review process, were very satisfied with the process of communication and the timeliness of interaction between them and the Program Authority. Additionally, both successful and unsuccessful applicants were satisfied with the reporting requirements outlined in the application form.

The Program Authority handles the financial management of cases. Contributions are paid on a reimbursement basis and are made directly to the nominal recipient's legal counsel. This task involves a review of receipts and claims submitted by funding recipients to ensure claimed costs conform to the terms set out in the contribution agreement. Funding recipients raised very few concerns about the financial management and administration of the Program. During the review of program files, disputes over disbursements, although highly irregular, were noted in a small number of cases. In these instances, the Program Authority advised the funding recipient of eligible disbursements and adjusted the accounts to conform to the rates outlined in the contribution agreement.

Additionally, several informants within government expressed that the human resource allocation of the Program is also efficient when compared with other federal programs of comparable size.

Effectiveness of delivery structure

Findings

Although the evaluation found that the delivery structure of the TCFP is carried out consistently, discussions with several informants indicate that there is a perception of a lack of transparency. Other common concerns raised by informants were a perception of potential conflicts of interest, and the potential for undue political influence on the Program. It is possible that these two perceptions are reinforced by a poor understanding of the Program, which may ultimately relate back to issues of transparency. The evaluation did not find evidence to substantiate any allegations of impropriety; however, recommendations are presented in section 5.0 that may mitigate these concerns.

- ***Transparency***

The Program operates in a reactive mode rather than a proactive mode. TCFP management makes information on the Program and its associated funding criteria available to the public upon request (as opposed to actively promoting the Program or posting the information on the Internet). The evaluation identified several potential advantages and disadvantages for making information available on request only.

Several informants within the government explained that the TCFP maintains a low profile because it does not want to be seen as encouraging litigation. Another common opinion expressed by informants was that active promotion may attract more applications which could not be supported given the current budgetary constraints. It is also possible that active promotion may be an unnecessary cost for the government if Aboriginal people, as well as lawyers dealing with Aboriginal issues, are already sufficiently aware of the Program.

A countervailing concern expressed frequently was the potential for Aboriginal people, as well as lawyers dealing with Aboriginal issues, to not be sufficiently aware of the Program. On this point, our findings are inconclusive. A significant number of experts suggested that many lawyers working in the field of Aboriginal law are familiar with the Program; however, a considerable number of informants questioned whether Aboriginal individuals or smaller bands have any knowledge of its existence.

Notwithstanding the question of TCFP awareness, many informants expressed the view that, as a publically-funded program handling funding disbursements, it should operate in a more transparent manner. The evaluation found that nearly all informants external to government were unaware of many aspects of the delivery structure, such as how an application is processed, and how a decision is made to determine acceptance or rejection. In addition to better promoting the Program in a public space, many informants expressed that the TCFP should revise its funding criteria to allow for better understanding of these processes.

- ***Perception of bureaucratic conflict of interest***

The current procedure for reviewing applications involves consultation with a variety of stakeholders to determine whether a case has the potential to create judicial precedent as well as whether a recommendation to fund a particular case should be made to the Minister of INAC. Several informants raised concerns over "potential conflicts of interest" which may influence the decision to fund or not fund a particular case. Although the concept of conflict of interest is normally only applied when a public servant's private interests may be in conflict with the public interest, these informants did not allege pecuniary personal gain as a motive for influencing behaviour, but instead stated that the involvement of representatives from Justice Canada and other departments in the review stage may place their departmental/bureaucratic interests before public interest. These informants conjectured that these departmental/bureaucratic interests may seek to prevent or shield the federal government or department from funding a particular case so as to avoid potential scrutiny and/or financial liability arising out of a ruling against Canada.

It is possible to perceive of this form of conflict of interest permeating the entire structure of the Program—namely, in having the government decide whether to fund cases in which it might be a party or whose outcome might adversely affect it. Evaluation findings indicate that in this respect, the Program carries an institutionalized perception of this form of potential conflict of interest, albeit one that cannot be avoided unless the Program is managed and delivered outside government. The Program's terms and conditions, as well as its funding criteria, are explicit in outlining that the prospective case must be in the federal government's interest to be settled in court and that INAC retains full discretion to deny funding without justification.

The perception of a potential of this form of conflict of interest can be and has been managed, however, by control over the level of involvement of individuals or departments with particular interests in the outcome of potential cases in the TCFP review process. Interviews with Program Managers revealed that the level of Justice Canada personnel's involvement in the TCFP review process has been curtailed over the life of the Program. Prior to 1998, representatives from Justice Canada were asked to provide a recommendation of whether test case funding should be provided; however, their current involvement in the TCFP is limited to providing a legal opinion on the prima facie precedential value of a particular case. Moreover, in 2001 the delivery structure was modified to remove the involvement of Justice Canada personnel in "taxing" the accounts of funding recipients (verifying that the expenditures are in good order).

Many informants stated that the current delivery structure of the Program assumes that Justice Canada lawyers will act in good faith and assess each case without regard to their own bureaucratic/departmental interests when asked to provide a legal opinion regarding whether a particular case has the potential to become a judicial precedent. Critics of the process, including expert academics, Aboriginal stakeholders, and others, suggested that INAC should, for this phase, seek the opinion of independent lawyers who are external from government.

Interviews with government officials confirmed that the involvement of Justice Canada in the TCFP review process should not be construed as a conflict of interest for several reasons. First, unlike the private sector, Justice Canada does not operate under a structure that prioritizes winning. Informants from the Department stated that their lawyers are public servants and there is no personal gain (financial or any other benefit) derived from the outcome of a particular case or the provision of a legal opinion. Second, several informants argued that the notion of conflict

of interest is misplaced as the Department of Justice is mandated to ensure that Canada's justice system is as fair, accessible, and efficient as possible. Third, informants from Justice Canada stated that when representatives from Justice Canada provide a legal opinion, it is on the based on the merits of the plaintiff's case and not the Crown's. Fourth, many informants at INAC and Justice Canada stated that, as per Section 5b of the *Department of Justice Act* (R.S., 1985, c. J-2), all legal opinions provided for the Government of Canada must come from Justice Canada as it is entrusted with acting as the government's legal adviser: "The Attorney General of Canada shall advise the heads of the several departments of the Government on all matters of law connected with such departments."[6]

According to several government informants, it is possible for Justice Canada to contract external legal counsel; however INAC is obligated to first seek an opinion from Justice Canada as to whether or not legal services from a member of the private bar are required.

- ***Authority to make funding decisions***

A small degree of criticism was levelled at the involvement of other stakeholders within INAC and other federal departments in determining whether a recommendation to fund a case will be presented to the Minister of INAC. Our evaluation concluded that the issue of authority to make funding decisions is shaped by the current Program terms and conditions that allow INAC to retain a considerable amount of control and discretion to interpret its own criteria for funding litigation which maintains that "the issue(s)... must be in the interest of both the Indian people and the Federal government to have the matter resolved in the courts."

Another common concern raised by informants was whether the final authority to make funding decisions should be vested in the Minister of INAC, who in many cases will be listed as the defendant and may face political pressure to provide or deny funding in specific cases. Our discussion with government officials revealed that this practice began in 2001. Prior to this time, the Deputy Minister was charged with making final decisions. Our analysis of case files revealed very few instances of direct involvement from the Minister (aside from authorizing recommendations) in core cases (both accepted and rejected files). Some informants from within the government suggested that the current authority structure may improve Cabinet awareness of funding decisions and enhance governmental oversight; however the evaluation was unable to elucidate any other value-added benefits from involving the Minister in the funding decision process.

[6] For a full copy of the Act see: http://laws.justice.gc.ca/en/J-2/index.html

How the Program Criteria has been Applied

Findings

Since it was established in 1983, the TCFP has funded 170 test cases. Between 2003-2004 and 2007-2008, 24 cases were funded (10 of which were continued from an earlier period), while 31 applications were rejected.

Table 5 shows the distribution of Program files according to their level of court.

Table 5: TCFP Cases 2003-2008

Level of Court	Funded cases	
	#	%
Supreme Court of Canada	10	42
Provincial Court of Appeal	3	13
Federal Court of Appeal	0	0
Federal Court – Trial Level	8	33
Provincial Superior Court	3	13
Provincial Court	0	0
TOTAL	**24**	**101**

Note: Totals may not sum to 100% due to rounding.

The data demonstrate that the TCFP, although maintaining a perception that it normally only funds appeal-level cases, does indeed support a considerable number of cases at the trial- and superior court levels (46%). This inconsistency may be explained by the significant number of strategic cases that account for 55% ($2,521,406.26) of cases funded at the trial and superior court levels. The review of Program files also revealed that all of these strategic cases were commenced before 2003.

- ***Rejected applications***

Findings

A sample taken of 16 of the 31 rejected funding files from 2003-2004 to 2007-2008 found that the majority of cases (69%) denied are below the appeal level.

Table 6: Rejected funding applications 2003-2004 to 2007-2008 (Level of court)

Level of court	Rejected cases	
	#	%
Supreme Court of Canada	1	6
Provincial Court of Appeal	3	19
Federal Court of Appeal	1	6
Provincial Superior Court	3	19
Provincial Court	4	25
Federal Court – Trial Level	3	19
Tax Court of Canada	1	6
TOTAL	**31**	**100**

The review of rejected files also indicated that there are several grounds on which a case is denied test-case funding.

Table 7: Rejected funding applications 2003-2004 to 2007-2008 (Grounds for rejection)		
Rationale	**Rejected cases**	
	#	**%**
Lacking precedential value (Justice Canada assessment)	5	31
Cost of litigation to high to bear	5	31
Other parties of the briefing note process do not recommend funding	3	19
Lacking precedential value (Program Manager and external consultant's initial assessment)	1	6
Ineligible for funding (in conflict with Program criteria)	2	13
TOTAL	**16**	**100**

The evaluation found that applicants are notified promptly of their rejection by the Program Authority. In most cases, the reasons for rejection correlated with the rationale contained in the case file; however, the authority often provided broad grounds for rejection such as: funding is normally restricted to appeal-level cases, there is a lack of available Program funds, the review did not find a strong precedential value, and/or INAC retains the authority to provide funding on a discretionary basis.

Several informants who had applied for funding and were rejected claimed that the Program criteria was too broad and could be narrowed to facilitate a better understanding of the types of cases that will be funded.

4.3 Success/Impact

Impact of the TCFP

The objective of the TCFP is to fund cases that have the potential to create Indian-related judicial precedents. Since the Program was first established in 1983, there is little doubt that the courts have had numerous opportunities to address and clarify some dimensions of the legal issues covered by the Program. The evaluation task, in this context, is to assess the extent to which this clarification process is the result, in part at least, of having the TCFP in place. As is often the case in a program evaluation, "establishing impact essentially amounts to establishing causality."[7] In other words, establishing an absolute causal link between the Program and the expected result is practically impossible. The discussion becomes more promising if we state the issue in terms of probability:

> "In the social sciences, causal relationships are ordinarily stated in terms of probabilities. Thus, the statement "A is a cause of B" usually means that if we introduce A, B is more likely to result than if we do not introduce A. This statement does not imply that B always results if A is introduced, nor does it mean that B occurs only if A is introduced."[8]

[7] Rossi, P.H., Freeman, H.E., and Lipsey, M.W. (1999). *Evaluation: A Systematic Approach*. Sage Publications, p. 238.

[8] Ibid.

For the purpose of this evaluation, the question becomes one of determining whether the creation of Indian-related precedents are more likely to result with the TCFP than without it. As mentioned above, this does not imply that clarification always results if the Program is in place (technically, if groups and individuals were to experience difficulties in accessing the Program, or if the support was not sufficient, the clarification may not occur), nor does it mean that clarification occurs only if the TCFP is in place.

It is important to recognize that within the context of the way TCFP operates, performance measurement is complicated by the fact that the most immediate expected result of the Program (a precedential related judgement) is not within the control of INAC but is in the hands of an independent judiciary. Moreover, the definition of what constitutes a judicial precedent is also a subjective concept. In some respects, all judicial decisions hold precedential importance irrespective of the side the court rules in favour of. It may follow from such a line of reasoning that the Program strives to create precedents which are significant in the context of their value to clarify the interpretation of legislation, treaties, and/or constitutional instruments. Notwithstanding these concerns, several measures exist to assess the relative importance of the cases funded by the TCFP.

Findings

Many informants expressed that it is virtually impossible to evaluate the precise implication and significance of cases funded by the Program due to the subjective and fluid nature of law. Nevertheless, the vast majority of informants agreed that the Program is allowing for some important precedents to emerge and does provide legal clarity to outstanding issues, especially at the appeal level. Many informants stated that without TCFP, their cases would not have been able to proceed. Some informants mentioned important non-appeal cases that have been funded through the Program; however, the inability to ordinarily fund cases at the trial level was cited as a significant impediment to advancing the creation of important precedents in Aboriginal jurisprudence, as appeal cases are largely based on trial-level evidence.

In addition to the opinion of experts in Aboriginal law, the evaluation examined the proportion of Aboriginal-related cases at the Supreme Court of Canada level that were funded through the TCFP. Since 1983, the Program has funded approximately 52% of all Aboriginal-related cases at the Supreme Court of Canada level, while between 2003 and 2007, the TCFP has funded approximately 63% of Aboriginal-related cases at the Supreme Court of Canada. It is important to note that methods of quantifying the proportion of Aboriginal-related cases funded by the Program should be taken with caution as they are dependent on subjective classifications regarding what constitutes a relevant Aboriginal-related case. Our analysis excluded cases that may involve Aboriginal peoples but do not focus particularly on an issue affecting Aboriginal rights or possess application to a large number of Aboriginal peoples.

Other measures used to gauge the importance of cases funded through the TCFP are provided in an internal report commissioned by the Program Authority. This report examined the significance of Supreme Court of Canada cases funded by the TCFP and was conducted in 2008 by two independent contractors. The report found that 84% of Supreme Court of Canada cases funded through the TCFP have been "applied" at least once in subsequent court judgements, while 75% have been mentioned more than 50 times (Malone and Fowler, 2008).

The evaluation was unable to assess the significance of cases funded at the trial and superior court levels with the same rigour as Supreme Court of Canada cases for a number of reasons. Although informants identified several important precedents that have emerged from these cases (in many instances as the result of the Crown's request for the government to provide funding), for the period of 2003-2004 to 2007-2008, 7 out of 11 of these cases are either ongoing, adjourned, and/or have been withdrawn by one of the parties. Moreover due to constraints and complexity, the evaluation did not attempt to classify and compare the relative importance of Aboriginal-related cases funded by the Program at the trial and superior court levels prior to 2003.

Areas of Aboriginal law funded by the Program

Findings

The evaluation found that since its inception, the TCFP has provided funding for many cases that have led to the creation of important precedents in diverse areas of Aboriginal-related jurisprudence such as treaty rights, Aboriginal rights and title, fiduciary duty, honour of the Crown/duty to consult, cost of litigation, and exemption from taxation and seizure. Other cases have served to clarify elements of the *Indian Act* and have defined rights of Métis and Non-Status Indians. A classification of cases funded between 2003 and 2004 and 2007-2008 are provided in Table 8.

Table 8: Issue areas of cases funded between 2003-2004 to 2007-2008

Issue area	#	%
Treaty Rights	7	30
Aboriginal Rights and Title	5	22
1985 amendments to the *Indian Act* (Bill C-31)	4	17
Application of Provincial Laws to Indians and Lands Reserved for Indians	3	13
Honour of the Crown / Duty to Consult	2	9
Métis and Non-Status Indians (*Constitution Act 1982* and *Indian Act*)	2	9
Cost of Litigation	1	4
Exemption from Taxation and Seizure	1	4
Fiduciary Duty and Vicarious Liability	1	4
Note: Some test cases involved more than one issue area (totals > 24; 100%)		

The data indicate that the most prominent issues in cases funded by the Program between 2003-2004 and 2007-2008 have been treaty rights, Aboriginal rights and title, and the 1985 amendments to the *Indian Act* (Bill C-31).

Economic and public policy impacts of the Program

Findings

Though difficult to measure the direct impact, evidence suggests that the resolution of outstanding legal issues has led to economic benefits for Aboriginal groups, the government, as well as all Canadians. In particular, experts agreed that resolution and clarification of issues relating to the duty to consult / honour of the Crown, treaty rights, Aboriginal rights and title, as

well as fiduciary duty have been particularly influential for economic development and have shaped public policy affecting the government's relationship with Aboriginal peoples:

- The honour of the Crown and its duty to consult with Aboriginal groups: Experts agreed that important decisions in these areas will likely impact all future negotiations undertaken between the federal government and Aboriginal groups regarding projects that have economic implications.

- Treaty rights: A significant proportion of test cases funded through the Program deal with litigation brought before the courts to interpret the rights guaranteed explicitly and implicitly, and agreed upon through treaties with First Nation groups. Many informants expressed that the Program has funded cases that have become significant precedents; however, there are still many claims that remain to be resolved.

- Fiduciary and vicarious liability: It is expected that the resolution of outstanding issues will continue to hold relevance for over 12,000 claims by Aboriginal peoples who were victimized under the Canadian Residential School system.

- Aboriginal rights and title: Informants maintained that decisions in these areas will likely hold importance for many groups asserting rights protected under s.35 of the *Constitution Act 1982* and will impact civil rights such as the right to sell or harvest resources for personal uses, self-government and the right to trade.

- 1985 amendments to the *Indian Act* (Bill-C31): With more than 90,000 names already added to the Indian registry, the rules relating to band membership, once clarified, can be expected to modify the profile of a number of Aboriginal communities and will carry financial implications.

- Métis and Non-Status Indians: Another notable change in the TCFP environment in the past decade has been the growth in the volume of litigation related to recognizing rights of Métis and Non-Status Indians. Several informants from within the government noted that key cases funded through the TCFP have led to decisions that have influenced the 2004 appointment of the Minister of Indian Affairs and Northern Development as the Interlocutor for Métis and Non-Status Indians (MNSI) (a point of first contact between MNSI organizations and the federal government) as well as a significant strategic reorientation of the Department.

4.4 Cost-effectiveness/alternatives

This issue needs to be addressed at several distinct levels. First, the evaluation must assess whether the overall level of funding to the Program ($750,000 annually) is appropriate to meet the Program's objective. Second, it is necessary to examine the cost-effectiveness of alternatives to the TCFP, which may also support the creation of Indian-related judicial precedents. Although there are no comparable programs that can serve as benchmarks upon which to perform a comparative analysis, there are other processes which may facilitate the creation of Indian-related legal precedents.

Is the current level of resources sufficient to meet the Program's objective?

Findings

A considerable majority of key informants noted that the Program could support more cases if it had more resources. However, most agreed that the current level of resources has allowed the Program to fund a number of significant cases which have resulted in important Indian-related precedents. Moreover, nearly all informants agreed that the Program is cost-effective for the government. An important consideration in this regard is that there is a general perception outside government that the Program is underfunded, which prevents it from supporting many trial-level cases. Should the Program be expanded to cover more trial-level cases, this would logically require an increase in resources.

An examination of the Program's expenditures between 2003-2004 and 2007-2008 indicate that its mandated A-base contribution (which has ranged between $500,000 and $1,000,000 – see Section 3.3) and is currently set at $750,000 has been insufficient to support its funding obligations. Over this period, the TCFP has averaged expenditures of $1 million per annum, resulting in a perennial shortfall of resources. Upon examining disbursements for the entire program, it was noted that a significant portion of the test case funding budget has been used to support strategic cases as part of the Department's litigation strategy. For example, although 24 cases were funded by the Program between 2003-2004 and 2007-2008, one strategic case accounts for approximately 46% of all expenditures. A large variance in the amount of funding was also noted — during this period the three most expensive cases account for roughly 70% of Program expenditures (see Table 9).

Table 9: Expenditures for cases funded between 2003-2004 to 2007-2008

Case No	Expenditures	Cumulative %
1	$2,385,227.56	46.69%
2	$930,991.79	64.91%
3	$255,405.51	69.91%
4	$200,000.00	73.82%
5	$200,000.00	77.74%
6	$175,000.00	81.16%
7	$165,423.83	84.40%
8	$150,000.00	87.34%
9	$149,725.17	90.27%
10	$75,000.00	91.74%
11	$65,208.36	93.01%
12	$63,400.51	94.25%
13	$63,254.72	95.49%
14	$45,500.00	96.38%
15	$42,310.11	97.21%
16	$37,046.92	97.94%
17	$30,007.09	98.52%
18	$20,000.00	98.91%
19	$19,991.62	99.31%
20	$14,160.59	99.58%
21	$9,086.60	99.76%
22	$6,800.00	99.89%
23	$3,822.25	99.97%
24	$1,615.35	**100.00%**
TOTAL	**$5,108,977.98**	

Is the amount of funding provided for each individual case adequate?

Several informants raised concerns over some of the rates for eligible expenditures outlined in the contribution agreements. In particular, many lawyers claimed that the maximum hourly rate for senior legal counsel (set at $150/hour) is considerably below market rates and the rates paid to Crown lawyers. Some informants indicated that in many instances the funding provided by the Program does not fully cover the cost of litigation and suggested that rates be increased or made commensurate with rates paid to Crown lawyers. It is reasonable to expect that increasing the rates paid to counsel without increasing Program resources will likely result in fewer cases being funded; however there is a risk of the Program losing relevance in the future if it is unable to provide lawyers with the basic means to cover their operating costs. The evaluation did not uncover any concerns regarding the maximum contribution of $1.5 million for any one case through all levels of court.

Jules decision

In 2003 the Supreme Court of Canada rendered its decision in *British Columbia (Minister of Forests) v. Okanagan Indian Band et al.*, henceforth referred to as the Jules decision. In this case, the plaintiffs sought court-ordered Crown funding for their actions related to B.C. provincial forestry decisions, which they alleged interfered with their Aboriginal rights. The Supreme Court of Canada ruled in favour of the plaintiffs and consequently set the legal precedent that the courts have authority to order the Crown to pay, without discretion, the costs of Aboriginal litigants where there are no funding alternatives, if the following three criteria are met:

1) the party seeking interim costs genuinely cannot afford to pay for the litigation and no other realistic option exists for bringing the issues to trial
2) the claim to be adjudicated is prima facie meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means
3) the issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

This decision [Jules], considered a watershed case in public interest litigation by many informants, may carry potential impacts for the TCFP. Specifically, the evaluation sought to examine:

- how the funding criteria under the Jules process and TCFP compare (what are the similarities and differences)
- how the two funding processes interact with/impact each other (complement/conflict)
- whether the Jules process undermines or even obviates the need for the TCFP
- the comparative costs of the two funding processes

Implications of the Jules decision

Findings

The evaluation found that although both the TCFP and the Jules process serve as mechanisms for funding public interest litigation, their criteria diverge significantly on several key points. First, the criteria outlined in the Jules decision does not impose a restriction on the issue or level of case in the court system; on this point the Jules criteria simply state that the issues of the case must be unique, of public importance, and must transcend the individual interests of the particular litigant. Several cases that may be unable to secure test case funding (e.g., because the TCFP usually funds only appeal-level applications) may be eligible to secure funding under the Jules process. Second, the Jules criterion of impecuniosity on the part of the litigants is not a feature of the TCFP. The Program criteria does state that the "financial resources available or prospectively available to a potential recipient will be considered" and that "the recipient must not be eligible for legal aid"; however the evaluation concluded that it was unable to determine if and how the TCFP takes the financial resources of a prospective applicant into consideration. Section 8a of the TCFP application form does ask potential applicants to disclose other sources of funding from which they would expect to draw to finance the action, and whether an application for legal aid was made; however there appears to be no other mechanism in place to assess the financial need of the applicant. Third, it is reasonable to assume that the criterion of public importance found in both the TCFP and Jules test may be interpreted differently by INAC and the courts. For example, unlike the TCFP, under the Jules process, there is no requirement stipulating that an issue or issues must be in the interest of the federal government to be resolved through litigation.

During interviews with informants, many Aboriginal law experts, including academics and lawyers, expressed that since 2003, the courts have been cautious in their application of the Jules test to determine whether to award interim and/or advanced costs.[9] Many informants mentioned the case of *Little Sisters Book and Art Emporium v. Canada* [2007], in which the Supreme Court of Canada revisited the issue of advanced cost orders in the context of a 2004 decision of the British Columbia Court of Appeal (BCCA) to set aside an advance cost order granted by the British Columbia Supreme Court to Little Sisters. The BCCA dismissed the order on the grounds that while the applicant had established that its claim was prima facie meritorious, it had not satisfied the other two criteria of the Jules test. The Supreme Court of Canada upheld the decision of the BCCA by arguing that the award of advanced costs was an exceptional measure not warranted in the circumstances of Little Sisters (*Little Sisters Book and Art Emporium v. Canada [Commissioner of Customs and Revenue]*). The Court also held that the fulfillment of the three listed conditions is necessary but not sufficient to justify an advanced costs order and that the Jules test requires that advanced costs awarded be used only as a last resort in order to protect the public interest. As indicted in Section 78 of the 2007 decision:

> The rule in Okanagan arose on a very specific and compelling set of facts that created a situation that should hardly ever reoccur. As this Court held in Okanagan, an advance costs award should remain a last resort.

[9] For additional commentary, see Tollefson: Costs and the Public Interest Litigant: Okanagan Indian Band and Beyond

Several informants mentioned that there have been few Aboriginal-related cases which have received Jules orders. Two notable exceptions include *Xeni First Nations v. British Columbia* (*Roger William v. The Queen*) in which funding was advanced to support an ongoing title claim by a native band in the Chilcotin area of British Columbia, and *Joseph v. Canada*, which concerns a dispute over fishing rights in the Hagwilget village of British Columbia. Several informants noted that the Supreme Court of Canada has applied the Jules decision in such a manner as to require prospective applicants to exhaust all other alternatives for funding before a Jules order can be made. As stated in Section 40 of the *Joseph v. Canada* decision to award advanced costs:

> the advance costs award must be an exceptional measure; it must be in the interests of justice that it be awarded. Therefore, the applicant must explore all other possible funding options. These include, but are not limited to, public funding options like legal aid and other programs designed to assist various groups in taking legal action. An advance costs award is neither a substitute for, nor a supplement to, these programs. An applicant must also be able to demonstrate that an attempt, albeit unsuccessful, has been made to obtain private funding through fundraising campaigns, loan applications, contingency fee agreements and any other available options. If the applicant cannot afford all costs of the litigation, but is not impecunious, the applicant must commit to making a contribution to the litigation.

One informant who has been involved in case(s) which have received Jules funding stated that he used the rejection letter from the TCFP as evidence to support the party's claim of impecuniosity required under the Jules procedure.

Cost-effectiveness of the Jules process versus the Test Case Funding Program

Findings

The evaluation sought to determine whether the Jules process is undermining and/or could obviate the need for the TCFP. The findings, based on interviews and analysis, demonstrate that the Jules process on its own is not a substitute for the TCFP. The Jules process is still in its infancy, and thus far has not been applied on a sufficient scale to allow for a rigorous comparison with the TCFP regarding their relative impacts on the creation of Aboriginal precedents. Moreover, an opinion expressed by many informants is that, for better or worse, the courts have applied a very stringent test for awarding interim and advanced costs in that it may no longer be a viable alternative for funding in many circumstances.

Notwithstanding the difficulty of drawing conclusions on the future applicability of the Jules process, it is possible to compare the cost-effectiveness of the TCFP with the few examples of cases which have been funded under a Jules order. The findings in this regard indicate that when compared to court-ordered interim/advanced cost awards, the TCFP is a significantly more economical means of financing litigation for the government. Under the TCFP, the maximum rate for legal counsel is capped at $150/hour, which is significantly lower than market rates and the rates set by courts under the Jules process (testimony from informants confirmed that rates awarded under Jules orders have ranged between 1.5 to 2 times the rates capped by the TCFP). Moreover, the total available funding for any one recipient and case through all levels of court

under the TCFP is set at $1.5 million, while informants confirmed that there have been no funding ceilings set under Jules procedures. Many informants noted that under the Jules process, the process of determining rates is often subject to costly and highly confrontational proceedings between the parties of the litigation.

Alternatives

To support a discussion of possible alternatives to the TCFP, our study identified five options available to the government: (1) termination of the TCFP; (2) continuation of the TCFP with operational improvements; (3) restriction of TCFP to strategic cases; (4) replacement of the TCFP with an arm's length public funding agency; and (5) replacement of the TCFP with an independent Aboriginal law agency.

The evaluation identified key advantages and disadvantages for each option. The choice among these options is dependent upon the strategic direction INAC wishes to pursue in regard to the resolution of outstanding Aboriginal legal issues. Appendix B presents issues that can be taken into consideration for each alternative/option.

5.0 Findings, conclusions and recommendations

This section presents a series of findings, conclusions and recommendations, based on the analysis provided in Section 4.0.

5.1 Relevance/rationale

Findings

The findings indicated that the preeminent rationale behind the Program is to provide support to INAC's litigation strategy by funding test cases which have the potential to clarify legal questions and create precedents that will assist INAC to meet its objectives of fulfilling its legal, statutory, and constitutional responsibilities to Indian people.

A widespread opinion expressed by informants was that many Aboriginal groups do not have the financial resources to advance litigation. Promoting access to justice for disadvantaged groups thus appears to be a strong rationale for supporting important test cases; however, the evaluation found that the Program is clearly not structured upon a legal aid foundation. This is explicitly stated in the Program criteria and is supported by findings which indicate that there is no apparent mechanism for taking the financial position of applicants into consideration, save one question on the application form which asks the applicant to list other sources of funding for the litigation.

Several informants raised the issue of whether the particular focus of the Program on the 1985 amendments to the *Indian Act* (Bill C-31) is appropriate given the myriad areas of Aboriginal law which require clarification.

Conclusions and recommendations

The evaluation indicates that the TCFP reflects INAC's current priorities. The activities of the Program directly support the broad strategic objectives of the Department to resolve outstanding disputes between Aboriginal peoples and the government.

The evaluation findings also indicate that the clarification of rights affecting Aboriginal peoples through litigation is an ongoing process that will continue into the foreseeable future.

The evaluation concluded that the Program should not alter its position in this regard for several reasons. First, including provisions for Bill C-31 funding in the Program criteria has not precluded the Program from funding cases dealing with other issue areas of Aboriginal law. Second, many interviewees confirmed that the issue of Bill C-31 remains prescient as it has not been fully resolved, and will likely hold relevance for the government, several bands, and many persons who are attempting to regain Indian status and band membership. Third, by including provisions for funding of C-31 issues in the Program criteria, INAC provides greater clarity to applicants regarding the eligibility conditions for which a case will be funded. If the Program were to remove reference to Bill C-31 from its criteria, it would still retain the authority to fund or decline applications relating to this issue; however, the eligibility conditions would be less clear for potential applicants.

Recommendation 1: **The evidence presented in this evaluation supports continued funding of the Test Case Funding Program (no action required).**

Recommendation 2: **Evidence indicates that the eligibility conditions for funding relating to the 1985 amendment to the *Indian Act* (Bill C-31) should remain in the Program criteria (no action required).**

5.2 Design/delivery

Findings

Our analysis determined that the management and administrative procedures of the Program are applied consistently for core cases in which an applicant submits a standard application form to the Program Authority. Legal opinions are sought, and other INAC sectors and government departments impacted by the case are consulted during the briefing note process. Strategic cases, or those selected internally to support the Department's overall litigation strategy, are decided upon at higher levels, and thus are not subject to the normal review process governing test case funding. The evaluation was not able to discern whether a formal procedure exists for selecting strategic cases.

A large majority of informants, including funding recipients and government stakeholders involved in the review process, were very satisfied with the process of communication and the timeliness of interaction between them and the Program Authority. Additionally, both successful and unsuccessful applicants were satisfied with the reporting requirements outlined in the application form.

Although the evaluation found that the delivery structure of the TCFP is carried out consistently, discussions with several informants indicate that there is a perception of a lack of transparency, of the potential for undue political influence on the Program, and the potential for bureaucratic conflicts of interest (departmental/bureaucratic interests seeking to prevent or shield the federal government or department from funding a particular case so as to avoid potential scrutiny and/or financial liability arising out of a ruling against Canada). The evaluation did not find evidence to substantiate any allegations of impropriety; however, the evaluation recommended that the Program take steps to improve its transparency, eligibility criteria, and documentation procedures.

Conclusions and recommendations

Discussions with several informants indicated that there is a perception among individuals outside government that the Program suffers from a lack of transparency. The evaluation examined several advantages and disadvantages of the current practice of making information on the Program available on request only. Our findings suggest that the Program may not be well known among all potential users of the Program, and that even those who are aware of its existence are unaware of many aspects of its structure and delivery processes. Some informants in the government expressed that more active promotion of the Program may lead to an increased flow of applications, which could not be supported within the current budget. However, this does not have to be seen as a negative outcome, as increased competition for scarce Program resources may result in a more optimal selection of cases with precedential value. The evaluation

concluded that while active promotion of the Program may not be necessary, eligibility criteria and information on how to apply for test case funding should be displayed in a public space.

As the Department proceeds with enhancing program transparency, it may consider using the program renewal process to clarify the TCFP's current terms and conditions. At this point, these terms and conditions still refer to "Indian case law," although experience to date indicates that the program has focused more broadly on Aboriginal case law (including, in particular, case law relating to Métis). Also, while the Department may ultimately wish to retain discretion on cases to be funded, the fact that the TCFP is a publically-funded program requires that the conditions for funding (eligible recipients, decision-making process, and funding parameters) must be stated with sufficient details to allow for a proper program implementation and program monitoring. In that sense, the current terms and conditions of the program would benefit from a review to address any concern about what the program will and will not support.

Although several informants alleged that aspects of the delivery structure of the program could precipitate conflicts of interest (namely that departmental/bureaucratic interests may override the public interest), the evaluation found that there are no straightforward solutions to mitigate this perception so long as the Program continues to be delivered by the government as opposed to an external funding agency or an independent body. The evaluation also found that since its inception, the TCFP has taken steps to minimize the involvement of Justice Canada in the review process. Still, government officials maintained that the TCFP is obliged to obtain legal opinions from Justice Canada. The evaluation concluded that allegations of conflict of interest on the part of representatives from Justice Canada are largely a hypothetical concern and do not reflect the reality of the Program.

Several informants raised concerns over the control of the Program, namely the involvement of other sectors and departments of INAC and the authority of the Minister of INAC to make funding decisions. The evaluation found that the current delivery process is structured so that INAC retains complete control over funding decisions. This ultimate discretion is explicitly stated in the Program criteria and should come as no surprise to applicants. The decision to vest the Minister of INAC with the authority over funding decisions, however, adds the possibility of political influence on the Program. Our analysis of case files revealed very few instances of direct involvement from the Minister (aside from authorizing recommendations) in core cases. Some informants from within the government suggested that the current authority structure may improve Cabinet awareness of funding decisions and enhance governmental oversight; however the evaluation was unable to elucidate any other value-added benefits from involving the Minister in the funding decision process.

Although not a major concern of the evaluation, an examination of the Program file management structure revealed that cases are separated into financial files, which contain information relating to the contribution agreements, and disbursements and litigation files, which hold all other material. In some instances, litigation files are abruptly ended without explanation. The evaluation findings suggest that the Program Authority engage periodically in the task of preparing brief case summaries that provide pertinent case details of the current status of the case. Once a case is concluded or funding is terminated, a final summary of the file history could be included at the end of the file. Although the evaluation concluded that the current Program Authority is able to meet its objectives under the current system of file management, these suggestions may prove helpful if new personnel and/or future evaluators or auditors are brought

in to review Program files. The preparation of summaries could include performance measurement indicators which would serve as a tool for both INAC and the Program Authority to assess whether Program outcomes have been met.

Recommendation 3: **a) Enhance program transparency by placing information on the Program on the Department's website and b) better document files.**

Recommendation 4: **As part of the program renewing process, INAC should review and update the current program's terms and conditions to establish clearer funding parameters.**

5.3 Success/impact

Findings

Evidence indicates that since its inception, the TCFP has provided funding for many cases which have led to the creation of important precedents in diverse areas of Aboriginal-related jurisprudence such as treaty rights, Aboriginal rights and title, fiduciary duty, honour of the crown/duty to consult, cost of litigation, and exemption from taxation and seizure. Many informants confirmed that the resolution of these cases have had significant impacts on economic development and have influenced policy development with the government.

The evaluation also examined the proportion of Aboriginal-related cases at the Supreme Court of Canada level that were funded through the TCFP. Since 1983, the Program has funded approximately 52% of all Aboriginal-related cases at the Supreme Court of Canada level, while between 2003 and 2007, the TCFP has funded approximately 63% of Aboriginal-related cases at the Supreme Court of Canada.

Conclusions

Despite several methodological challenges associated with evaluating the impact of the TCFP, it was widely noted among informants that the Program has been successful in funding many cases which have created significant judicial precedents. Moreover, many informants stated that important cases would have been unable to proceed without support from the TCFP. The evaluation discovered that many important Aboriginal-related precedents have emerged from cases not funded through the TCFP; however this finding in itself does not diminish the impact of the TCFP.

5.4 Cost-effectiveness/alternatives

Findings

While a considerable majority of key informants noted that the Program could support more cases if it had more resources, most agreed that the current level of resources has allowed the Program to fund a number of significant cases which have resulted in important Indian-related precedents. Moreover, nearly all informants agreed that the Program is cost-effective for the

government, although the evaluation found there is a general perception outside government that the Program is underfunded, which prevents it from supporting many cases at the trial-level (which are often significantly more expensive than litigation at the appeal level).

Conclusions and recommendations

Some informants indicated that in many instances the funding provided by the Program does not fully cover the cost of litigation and often requires significant pro-bono contributions on the part of the nominal recipient's legal counsel. Several informants suggested that rates be increased or made commensurate with rates paid to Crown lawyers. It is reasonable to expect that an increase in the rates paid to counsel without increasing Program resources will likely result in fewer cases being funded; however there is a risk of the Program losing relevance in the future if it becomes seen as being unable to provide lawyers with the basic means to cover their operating costs.

Notwithstanding the difficulty of drawing conclusions on the future applicability of the Jules process, a comparison of the cost-effectiveness of the TCFP with the few examples of cases which have been funded under a Jules order indicate that the TCFP is a significantly more cost effective means for the government to finance litigation. It will be critical for INAC and the TCFP to monitor the evolution of the Jules process through the courts in order to formulate an appropriate strategy to maximize the creation of important Indian-related precedents and minimize the cost to the public.

The evaluation identified several alternatives to the current TCFP that the government may want to pursue. Key advantages and disadvantages are offered for each option; however recommendations are not included as many of these scenarios are hypothetical and would need to be carefully analyzed further in consultation with affected parties. The choice among these options is almost certainly dependent upon the level of influence the government desires to maintain over the ability of Aboriginal peoples to seek resolution of their grievances through the judicial process.

Recommendation 5: **Given the current Program budget of $750,000/annum, funding should be restricted to test cases at the appeal level.**

Recommendation 6: **Any future renewal of the TCFP should consider indexing the hourly rates paid to legal counsel to inflation.**

Appendix A

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Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue), [2007] 1 S.C.R. 38, 2007 SCC 2

Joseph v. Canada, [2008] FC 574

Xeni Gwet'in First Nations v. British Columbia, [2002] BCCA 434, 2004 BCSC 963

Department of Justice Act, R.S.C. 1985, c. J-2

Appendix B

Table of Alternatives/Options

Table 10: Alternatives/options		
Description	**Advantages**	**Disadvantages**
(1) Termination of the TCFP		
Existing funding commitments would be fulfilled; however no new cases would be funded Possible justifications for this option would be if the program's disadvantages outweighed its benefits	Elimination of potential allegations of impropriety and interference in the justice system Cost saving of annual TCFP expenditures → resources could be shifted to other priorities	Likely provocation of criticism from Aboriginal organizations and legal organizations Likely more costly for the government if court-ordered interim/advanced cost (Jules) orders were to become more frequent Reduction in the number of important precedential cases brought forward due to financial limitations facing many Aboriginal groups (especially if Jules awards remain infrequent)
(2) Continuation of the TCFP with operational improvements (recommended alternative)		
The Program would be maintained with operational improvements recommended in the evaluation	Maintenance of a program which, evidence indicates, is achieving its intended impact of supporting the creation of important Aboriginal-related precedents Potentially less costly than creating or funding new entities (Options 4 & 5) INAC retains influence over funding decisions (as compared to Options 4 & 5)	Perception of the potential for conflicts of interest remains a concern Perception of the potential for political influence remains a concern
(3) Restriction of TCFP to strategic cases		
The TCFP would continue but would only fund cases relating to issues or areas deemed to be strategic by the Department to be resolved through litigation	Tighter focus to support cases which will have the most significant influence for government	Increased perception of conflict of interest (compared to Options 2, 4, & 5) Increased perception of political influence (compared to Options 2, 4, & 5)
(4) Replacement of the TCFP with an arm's length public funding agency		
The TCFP would be replaced with an arms-length external funding agency potentially modelled upon the former Court Challenges Program. It is likely that a considerable amount of time and cost would be required to determine the specific criteria which would govern such an organization (i.e., authority, governance structure, mandate, types of cases eligible for funding, budget, etc.)	Low perception of conflict of interest Low perception of political influence in funding decisions	Initial start-up costs Reduced discretion over funding decisions Potentially more costly than having the Program administered within INAC (e.g., agency would likely require additional resources) Selection of members for the governing body could be seen as controversial
(5) Replacement of the TCFP with an independent Aboriginal law agency		
This authority and management activities of the TCFP would be transferred to an external non-profit Aboriginal Law Agency such as the Indigenous Bar Association. Alternatively, a new independent Aboriginal Law Agency could be created following negotiation with existing Aboriginal organizations. As with Option 4, this scenario could involve a lengthy and costly deliberation process to determine the specific criteria to govern such an organization.	Low perception of conflict of interest Low perception of political influence in funding decisions Selection of members for the governing body potentially less controversial than Option 4 (as it would be a totally Aboriginal-managed operation)	Initial start-up costs Reduced discretion over funding decisions Potentially more costly than having the Program administered within INAC (e.g., agency would likely require additional resources)